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January 12, 1999

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Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM Docket No. 90-380
Reply in Further Support of Motion To Dismiss
Joint Request For Approval Of Settlement Agreement
And In Response To Consolidated Reply To Opposition To
Joint Request For Approval Of Settlement Agreement

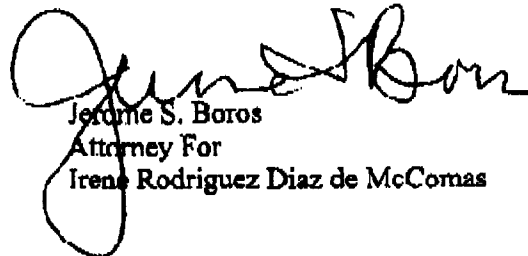
Dear Ms. Roman Salas:

Enclosed for filing, on behalf of Irene Rodriguez Diaz de McComas, are an original and fourteen (14) copies of a Reply in Further Support of Motion To Dismiss Joint Request For Approval Of Settlement Agreement And In Response To Opposition To Consolidated Reply To Opposition To Joint Request For Approval Of Settlement Agreement. Also enclosed is an additional copy of this letter for stamping and return to the courier.

Please address all correspondence and phone inquiries pertaining to this matter to:

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Very truly yours,



Jerome S. Boros
Attorney For
Irene Rodriguez Diaz de McComas

Encls. (16)

cc: All parties on List 1 w/encl.

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JAN 12 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re: Applications of)	MM Docket No. 90-380
)	
RIO GRANDE BROADCASTING, CO.)	File No. BPH-880815MV
)	
ROBERTO PASSALACQUA)	File No. BPH-880816NN
)	
IRENE RODRIGUEZ DIAZ DE McCOMAS)	File No. BPH-880816OR
)	
UNITED BROADCASTERS COMPANY)	File No. BPH-880816OW

To: The Commission

**REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS
JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT
AND IN RESPONSE TO CONSOLIDATED REPLY TO OPPOSITION
TO JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT**

Irene Rodriguez Diaz de McComas ("McComas"), by her attorneys, hereby replies to the Consolidated Reply to Oppositions to Joint Request for Approval of Settlement Agreement filed by Rio Grande Broadcasting Co. ("RGB") and United Broadcasters Company ("United"). That pleading responded to McComas' Motion to Dismiss Joint Request for Approval of Settlement Agreement and Opposition to Joint Request for Approval of Settlement Agreement ("Motion To Dismiss").

1. In her Motion To Dismiss, McComas demonstrated that, because approval of the settlement proposed by RGB and United was contingent on adjudication of an exception filed by a fourth party, Roberto Passalacqua ("Passalacqua") with respect to McComas' application, the Commission's order giving all pre-July 1, 1997 applicants the opportunity to

participate in a competitive auction for the permits for which they had applied,¹ precludes approval of the proposed settlement. RGB and United respond by citing three decisions approving settlements while dismissing other applicants. But all of those cases involve settlements filed with the Commission before the Auction Order was adopted. In both Gonzalez Broadcasting, 12 FCC Rcd. 12253, and Heidi Damsky, 13 FCC Rcd. 11688, the Commission's approvals of the settlements also predated the Auction Order.

2. While the Commission's decision in the third case, Breeze Broadcasting Company, Ltd., FCC 98-26, released November 6, 1998, was issued after the Auction Order, the settlement agreement at issue there was filed during the 180-day window provided for in Section 3002(a)(3) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997). Congress there directed the Commission to waive provisions of its regulations to permit agreements made during that window period to remove conflicts between applications. The Commission stated, "This provision discloses a Congressional intent to permit parties to a proceeding such as this one to enter into settlements despite the fact that the Commission was given the authority to resolve proceedings by auction." Breeze Broadcasting, *supra*, at ¶ 8. The settlement agreement propounded by RGB and United in this proceeding was made after the window period expired. Accordingly, unlike the statutorily-mandated exception underlying Breeze Broadcasting, there is no basis for relieving RGB and United of the Commission's rule announced in the Auction Order deferring, until after an auction, unresolved issues in hearing cases involving pre-July 1, 1997 applications.²

¹ First Report and Order adopted August 6, 1998 and released August 18, 1998 in Implementation of Section 309(j) of the Communications Act - Competitive /bidding for the Commercial Broadcast and Instructional Television Fixed Service Licenses, FCC 98-194, 63 F.R. 48615, 13 CR 279 (the "Auction Order").

² RGB and United argue that the Auction Order does not require deferral of the issue
(continued...)

3. RGB and United also reassert that facsimile signatures in McComas' application compel its dismissal. They are wrong. They cite no case in which an application tendered with an original signature on the EEO certification, an integral part of an application, was rejected. The cases they do cite all involved applications containing only facsimile signatures, with no originals anywhere. The Commission's consistent rulings on this subject (see Motion to Dismiss at ¶¶ 8 and 21) render it indisputable that the signatures on McComas' application as filed meet the Commission's standards.

4. In apparent recognition of that fact, RGB and United argue that the Commission's existing policy is bad law. They are wrong again. The Commission's interest in detecting forgeries, for example, is implicated when none of the signatures are originals, for facsimiles can, indeed make it hard to detect the use of a stamp, an insertion or an erasure. But when an application carries an original signature on an integral part of the application, as did McComas' application, those problems are solved. Likewise solved is the issue regarding the importance of signatures in holding applicants responsible for the truth of their applications. When an application contains an original signature, a prosecution for making a false statement under 18 U.S.C. Section 1001 can proceed without the obstacle that could arise out of the exclusive use of facsimile signatures.

²

(...continued)

concerning McComas' application because it does not go to her "qualifications." This is a distinction without a difference. McComas is a mutually exclusive applicant for the permit at issue, and adjudication prior to an auction of the significance of the fact that her application was filed with a mix of original and facsimile signatures raises the same issues of administrative burden and inconvenience as adjudication of an issue that could bear the "qualification" label. Trying to pick and choose which issues may be decided before an auction and which should be decided afterward only adds another level of pre auction administrative decision-making that the Auction Order determined was inappropriate.

5. Finally, in the unlikely event that the Commission were to decide to change the law, and rule now that an original signature on the EEO Certification is no longer sufficient to satisfy the Commission's requirements, it would be manifestly unfair to impose the burden of that rule upon McComas. She submitted her application in mid-August, 1988, with an original signature on the EEO Certification. The next day, she supplied original signatures to the other certifications, which had been accepted procedure over the years, except for a brief period when the Commission was compelled to be Draconian, adopting a "hard look" policy, requiring applications to be letter-perfect and foreclosing curative amendments. The Commission now has reverted to its prior norms, but even during the life of the "hard look" policy, the Audio Services Division ruled that the certification on the EEO portion of the application is "essentially the same" as the Section VII certification. Josephine M. Rodriguez d/b/a Cielo Communications, 3 FCC Red 6752 (Audio Services Div. 1988) ("Cielo"). And notably in 1990 when the Mass Media Bureau announced an explicit policy Radio South Burlington, Inc., 5 FCC Red 1688 (Audio Services Div.) that applications with only facsimile signatures were not tenderable, the Commission, when the Radio South Burlington, came before it, approved the exception recognized in Cielo, holding in 6 FCC Red 4703 (1991) ("Salvatoriello") that a certification on the EEO portion of the application is the functional equivalent of the Section VII certification. And, as explained in the Motion To Dismiss, the acceptability of an application with an original signature on the EEO certification was reaffirmed in Dasan Communications Corp., 7 FCC Red 7550 (1992) ("Dasan") in a Commission opinion citing with approval the Review Board opinion in this case that RGB and United now attack.

6. Given these facts and circumstances, dismissing McComas' application at this late date would be manifestly unfair. McComas has demonstrated her interest in constructing the station at issue by pursuing her application for more than ten years, at a cost of

hundreds of thousands of dollars. Dismissing her application now through an overruling of years of consistent precedent would implicate the doctrine by which retroactive administrative rulemaking that prejudices a party whose conduct met the standards being overruled is "condemned" unless necessary to avoid "mischief . . . greater than the ill effect of the retroactive application of a new standard." SFC v. Chenery Corp., 332 U.S. 194, 203 (1947).

7. Dismissing McComas' application by retroactively overruling Cielo, Salvatoriello, and Dasan would not avoid "mischief" but create it by depriving the public of the benefits of an auction, which the Commission identified in the Auction Order:

[T]he relative advantages of auctions. . . include the public interest benefits of encouraging the efficient use of the frequency, assigning the frequency to the eligible party that values it the most and recovering for the public a portion of the value of spectrum made available for commercial use. . . .

Auction Order, 13 CR at 290, ¶ 40.

8. Dismissing McComas' application also would require the invocation of a policy which no longer has vitality or purpose. The Commission currently does not dismiss applications with readily curable imperfections and United cites no reason why the McComas application should be dismissed at this juncture, after Mrs. McComas has spent years in seeking to create the apparently only 100% female-owned station in Puerto Rico. Under the circumstances, were the Commission inclined to apply a rule of the mid 80's - at this stage in the late 90's- the Commission would be obliged to consider whether waiver of the rule would be appropriate under WAIT Radio v. FCC, 418 F.2d 1153 (DC Cir. 1968). Cf. Salvatiello, *supra*, at 23. In such an event, McComas should be entitled to equitable relief and Commission retention of its application.

Conclusion

9. The Commission should grant McComas' Motion to Dismiss, deny RGB and United's Joint Request for Approval of Settlement and direct that an auction proceed in accordance with the Auction Order.

Respectfully submitted,

Irene Rodriguez Diaz de McComas

By: 

Jerome S. Boros

By: 

Andrew Irving

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Her Attorneys

Dated: New York, New York
January 11, 1999

List 1

CERTIFICATE OF SERVICE

I, ANNA McNAMARA, a secretary in the law offices of Robinson Silverman Pearce Aronsolm & Berman LLP, do hereby certify that on this 12th day of January, 1999 I have caused to be mailed a copy of the foregoing **REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT AND IN RESPONSE TO CONSOLIDATED REPLY TO OPPOSITION TO JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT** to the following:

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ANNA McNAMARA

Dated: January 12, 1999